

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

October Term, 1989

No. 89-513

LLOYD B. FISHER,

Petitioner,

-VS-

JUDGE JAMES J. KRAJEWSKI,
Individually and in his Capacity as
Judge of the Lake County Court, Division III,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

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ISSUE PRESENTED FOR REVIEW

Whether failure to file a transcript of trial and then misrepresenting the facts to the Court of Appeals warrants sanctions.

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Respondent, Judge James J. Krajewski, Individually and in his capacity as Judge of the Lake County Court, Division III, respectfully prays this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), thereby refusing to review the decision entered by that Court in cause number 88-1827 on May 2, 1989.

OPINIONS BELOW

The proceedings in the District Court are unpublished and appear in the appendix to the Petition at page C-1.

The opinion of the Seventh Circuit is published at *Fisher v. Krajewski*, 873 F.2d 1057 (7th Cir. 1989), and is found in the Appendix to the Petition at page B-1. The order denying rehearing with suggestion for rehearing *en banc* is unpublished and is found in the Appendix at page A-1.

JURISDICTION

Petitioner Lloyd B. Fisher (hereafter Fisher) alleges jurisdiction in this Court pursuant to 28 U.S.C. §1254(1). The Petition was timely filed in this Court.

STATEMENT OF THE CASE

I. Nature of the Case

This Petition arises from an opinion of the Seventh Circuit affirming a judgment, entered on a jury verdict, in favor of a state court judge alleged to have terminated the employment of Fisher in violation of the First Amendment. It was claimed that the termination of employment was predicated upon the political affiliation of Fisher.

The precise issue addressed in this response arises from the opinion of the Seventh Circuit, in which that court found that Fisher and his counsel had violated the Federal Rules of Appellate Procedure and imposed sanctions upon both Fisher, an attorney, and his counsel.

II. Course of Proceedings Below

The complaint under authority of 42 U.S.C. §1983 was filed in the United States District Court for the Northern District of Indiana, Hammond Division (hereafter District Court), in 1986. All parties consented to trial before and entry of final judgment by a United States Magistrate.

Following dismissal of two original parties defendant, trial

was had to a jury in February, 1988. The jury returned a verdict in favor of Judge Krajewski, the sole remaining defendant.

Fisher initiated an appeal to the Seventh Circuit after first unsuccessfully seeking a new trial. The order denying the motion for new trial is found in the Appendix to the Petition at page C-1.

In the Seventh Circuit no record was filed by Fisher.

The Seventh Circuit affirmed the judgment of the District Court on May 2, 1989. *Fisher v. Krajewski*, 873 F.2d 1057 (7th Cir. 1989). In that opinion the Seventh Circuit, after affirming the District Court on the merits, determined that for violations of the Federal Rules of Appellate Procedure Fisher and his two counsel were to be sanctioned in the total amount of \$1500.00, to be borne equally.

Fisher sought rehearing with a suggestion for rehearing *en banc*. That petition was denied June 13, 1989. Appendix, page A-1.

III. Statement of the Material Facts

Before turning to the facts directly related to the imposition of sanctions, a brief discussion of the facts underlying the case in the District Court is necessary.

James J. Krajewski, Judge of the Lake County Court, Division III, found it necessary to terminate the employment of three public defenders to clean up the court, to respond to the public, to restore respect for the court and for court processes, and to clean out the "old guard" in that court. One of the public defenders was Fisher. The prior judge and his chief public defender had been indicted and convicted in federal court for actions relating to "scams" involving the court. Judge Krajewski was appointed by the Governor of Indiana to replace the convicted former judge.

Fisher, a Democrat, alleged that the termination of employ-

ment was because of his political affiliation. Judge Krajewski is a Republican.

During the course of this litigation Fisher was given the opportunity to return to employment with Judge Krajewski's court. On his first day back Fisher was late and a letter of reprimand was given him. Later the same morning he and another public defender decided to trade assignments without prior approval of Judge Krajewski as required in written rules of conduct for the public defenders. A brief suspension was imposed. Fisher thereupon determined that he had been "constructively discharged" in retaliation for having filed the action in federal court.

The jury determined that Fisher was not discharged from his employment as a result of his political affiliation and that the discipline imposed upon his brief return to the court was not the result of retaliation and that he was not constructively discharged.

Turning to the facts that are relevant to the issue that this Court has directed Respondent to address, Fisher and his counsel initiated an appeal to the Seventh Circuit but failed or refused to follow the applicable Federal Rules of Appellate Procedure.

Specifically, Fisher and his counsel did not order the transcript. They did not take any of the steps set forth in Rule 10(b), Federal Rules of Appellate Procedure mandated when the entire transcript is not to be ordered, such as notifying opposing counsel, filing a statement of the issues, or seeking to have an agreed statement of the pertinent facts.

In the Seventh Circuit the next step taken by Fisher after the filing of the notice of appeal was to file his brief. In the brief Fisher asserted events had occurred that the transcript, ordered by Judge Krajewski, showed not to have occurred, as set forth in more detail in the argument section of this response.

The brief filed in the Seventh Circuit by Judge Krajewski, delayed because of the necessity for securing the transcript, asserted as the first issue that the appeal should be dismissed for failure of Fisher to secure and file the transcript. Fisher filed two motions for enlargement of time within which to file his reply brief, but the second motion was denied for failure to comply with the Rules.

Oral argument was held in the Seventh Circuit, during which one issue addressed by the Court, through its questioning, was the failure to file the transcript.

In its published opinion the Seventh Circuit taxed in favor of Judge Krajewski the cost (single and not double) of the transcript, sanctioned Fisher and his counsel a total of \$1500.00 and referred the case to the Indiana Supreme Court Disciplinary Commission.

SUMMARY OF THE ARGUMENT

The egregious actions of Fisher and his counsel in prosecuting the appeal in this case warranted the sanction imposed. Failure to follow applicable rules of court is properly subject to sanction by the court in front of which the failure occurs. The decision of the Seventh Circuit is in keeping with the decisions of other courts of appeal and is authorized under the Federal Rules of Appellate Procedure. In the appeal not only was the transcript not filed but the proceedings before the District Court were misrepresented.

The request for appropriate sanctions was made in the brief of the appellee in the Seventh Circuit, the filing of which preceded the oral argument at which Fisher and both of his counsel were present, and therefore he was given notice and an opportunity to respond.

REASONS FOR DISALLOWANCE OF THE WRIT

This case does not present a sufficient or reasonable basis for review of the actions of the Seventh Circuit. The actions of

Fisher and his counsel in not only refusing to file the transcript but in misstating the record and misrepresenting facts warranted at least the rather mild sanction imposed.

Contrary to their assertion, there is no divergence of practice between the Circuits, and they have failed to cite a single case from this Court that is at odds with the decision of the Seventh Circuit.

Before further addressing the reasons why the petition should be denied, mention is be made of the waiver of the right to respond to the petition as contained in a letter to the Clerk of this Court.

In that letter it was stated that the right to respond was being waived as to the first issue in the petition because the matter was one between the courts on one hand and Fisher and his counsel on the other, and is not a point of contention (strictly speaking) as between Fisher and Judge Krajewski.

It is still felt that this is true, and this response is made for two reasons. First because this Court requested it. Judge Krajewski and his counsel herein have no problem assisting this Court by providing a response and a more thorough and correct recitation of the events in the Seventh Circuit, and no disrespect for this Court or its request for a response is intended. This relates to the second reason why a response is filed even though the issue does not directly impact either the judgment or its affirmance. As members of the bar Judge Krajewski and his counsel recognize their obligation to assist this and all courts in the administration of justice. This response is filed to fulfill that duty.

Turning to the merits and to the question of whether a writ of certiorari should issue as requested, it should not. No sufficient or proper reason is presented that meets the guidelines of Rule 17.1 of the Rules of this Court.

The failure to file the record cannot be considered in isolation. This lapse is shown to be both inexcuseable and contrary

to the administration of justice when viewed in the context of the issues on the appeal and the true facts, as shown and as can only be shown through the record.

The first issue in the appeal concerned the granting of a motion in limine, made from the bench the morning of trial and not in writing. The only method by which to determine the contours of the ruling and the basis for it is to review the record. Not only did Fisher not provide the Seventh Circuit with the precise terms of the order in limine, he misrepresented the ruling to the Seventh Circuit. He claimed that the ruling precluded the use of prior inconsistent testimony when there is no such ruling in the record. *See* Appendix, p. B-12 & n.6. Had there been such a ruling then the verdict and judgment would likely have been reversed. Judge Krajewski had to file the transcript in order to demonstrate the true facts so that the judgment in his favor would not be reversed.

This was not the only misrepresentation. Two of the issues related to instructions. It needs no citation to authority that an instruction as to which no objection is made cannot be contested on appeal.

Fisher and his counsel claimed not once but twice that objection to the instructions had been made. After a review of the record the Seventh Circuit found that no objection had been made and that any claim of error had thus been waived. There was even a claim that one of the instructions had been the subject of an objection after the magistrate stated, in denying the motion for new trial, that he had reviewed the transcript and that there was no objection. Appendix, p. C-6.

As to the other instruction, containing the forms of verdict, Fisher claimed that he had requested two *sets* of forms, one set relating to the original dismissal and one set relating to the alleged constructive discharge. Again, the record was misstated by Fisher and his counsel and had the transcript not been secured that error and the complete lack of merit in the assertion could not have been properly addressed by the Sev-

enth Circuit.

Fisher claims that a writ of certiorari should be granted because the decision of the Seventh Circuit is in conflict with decisions of other courts of appeal on the same point. He asserts that other circuits have held that bad faith is a prerequisite to the imposition of sanctions and that he was not given proper notice of the possibility of sanctions. He is not correct on either point.

—The decision to impose sanctions for failure to file the transcript or to follow the alternatives in Rule 10(b), Federal Rules of Appellate Procedure, is consistent with decisions of other circuits. In at least three cases in other circuits dismissal of the appeal for failure to file the transcript has been imposed. *Abood v. Block*, 752 F.2d 548 (11th Cir. 1985); *Thomas v. Computax Corporation*, 631 F.2d 139 (9th Cir. 1980); and, *Brattrud v. Town of Exline*, 628 F.2d 1098 (8th Cir. 1980). Similar results were authorized in *Gulf Water Benefaction Co. v. Public Utility Commission*, 674 F.2d 462 (5th Cir. 1982) and *United States v. One Motor Yacht Named Mercury*, 527 F.2d 1112 (1st Cir. 1975), relied upon by the Seventh Circuit, although the appeal in *Gulf Water* was not dismissed on the facts of the case.

It is true that none of these relied solely upon the federal rule, but the existence of a local rule to enforce the federal rule is hardly dispositive. It is also true that none of these imposed the particular sanction imposed in this case, but that is not dispositive, either. Sanctions must be tailored to the case, and they are appropriate in this case.

Other circuits have imposed sanctions for other but similar failures to follow the Federal Rules of Appellate Procedure.

In *In re Hanson*, 572 F.2d 192, 193 (9th Cir. 1977), the Court sanctioned the attorney \$500.00 and suspended from practice before that court for failure to file the record and failure to file a brief. Indeed, in the middle to late 1970's that Circuit imposed sanctions in numerous reported cases for failure to file a brief.

In *United States v. Potamkin Cadillac Corp.*, 689 F.2d 379 (2d Cir. 1982), at pages 381-82, the court imposed sanctions because the appeal was

totally lacking in merit, framed with no supporting authority, conclusory in nature, and utterly unsupported by the evidence.

The same can be said of the present case, at least as to those issues that would never have been urged upon a correct statement of the record, which would follow from securing and reading the transcript.

In *In re Tatum*, 587 F.2d 633, 684 (5th Cir. 1979), the court imposed the sanction of suspension from practice for six months for failure to file a brief.

In *In re Tranakos*, 639 F.2d 492, 493 (9th Cir. 1981), the Court suspended an attorney indefinitely until he could

demonstrate to [the Ninth Circuit] that he is knowledgeable regarding the Federal Rules of Civil Procedure and the rules of [that] court.

In addition to the suspension, he was sanctioned in the amount of \$500.00.

In *United States v. Bush*, 797 F.2d 536 (7th Cir. 1986), counsel was sanctioned \$500.00 for failure to file a brief in a criminal matter.

In *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538 (9th Cir. 1988), at page 1548, the Court imposed sanctions of \$1000.00 for failure to comply with Rule 28(a)(3), Federal Rules of Appellate Procedure and the parallel rule of the Ninth Circuit by not making specific references to the record on appeal. Fisher and his counsel did not, for obvious reasons, cite to the pages of the transcript in this appeal, either.

In *Olympia Company, Inc. v. Celotex Corp.*, 771 F.2d 888 (5th Cir. 1985), at page 893, the court imposed sanctions on

counsel for submitting a brief that made no attempt to address the elements requisite to obtaining reversal and which contained irrelevant citations to the record.

These cases show that other courts are imposing like sanctions for failure to follow the Federal Rules of Appellate Procedure, although none, it is conceded, cites as its sole basis a failure to comply with Rule 10. Non-compliance with Rule 10 was part of the basis in *In re Hanson* and lack of familiarity with rules (which can be inferred in this case) was the basis for the imposition of sanctions in *In re Tranakos*. Thus, contrary to what Fisher would like this Court to conclude, other circuits do, when appropriate, impose sanctions for failure to comply with the Federal Rules of Appellate Procedure.

Fisher claims that in other circuits a finding of bad faith is required before sanctions will be imposed. None of the above cases says anything about bad faith. Further, sanctions on counsel have long been imposed in other contexts without a finding of bad faith, such as appearing late or failing to appear for scheduled court appearances.

The Ninth Circuit has specifically rejected "bad faith" as a prerequisite to the imposition of sanctions. In imposing a suspension from practice for two months, that court stated:

It is not required that the court find intentional conduct in order for an attorney to be disciplined pursuant to Rule 46(c). Lack of diligence which impairs the deliberations of the court is sufficient.

DCD Programs, Ltd. v. Leighton, 846 F.2d 526, 528 (9th Cir. 1988). While sanctions in this case do not find as their basis Rule 46(c), this language shows that other circuits do not, as Fisher claims, require a finding of bad faith before imposing sanctions. As in this case, the misrepresentation in *DCD Programs* went to the heart of the appellate issue.

The Ninth Circuit had earlier imposed sanctions in a similar matter based upon a conclusion that the attorney's conduct was

"negligent". *In re Disciplinary Action Curl*, 803 F.2d 1004 (9th Cir. 1982).

The Tenth Circuit has also rejected the proposition that a finding of bad faith must be made and must be explicitly stated. Actions similar to those in this case were found to warrant sanctions. The sanctioned party made references to the record that were contrary to what the record in fact showed, and the court found that this shows that counsel is either:

cavalier in regard to his approach to this case or bent upon misleading the court. In either event, his lack of good faith is manifest.

Herzfeld & Stern v. Blair, 769 F.2d 645, 647 (10th Cir. 1985). That same cavalier approach to this case also manifests a lack of good faith and the Seventh Circuit was warranted in imposing sanctions.

The District of Columbia Circuit likewise has rejected as a prerequisite a finding of bad faith before imposing sanctions on appeal.

[S]ubjective bad faith is not necessary; attorneys have been held accountable for decisions that reflect indifference to the merits of a claim.

Reliance Insurance Co. v. Sweeney Corp., Maryland, 792 F.2d 1137, 1138 (D.C. Cir. 1986). Sanctions of \$5220.00 in attorney fees to the opposing party were imposed. The court in that case premised its sanctions on 28 U.S.C. §1927 and observed that "deliberate" conduct was necessary. Deliberate conduct in the refusal to order a transcript is present in this case.

Even if a finding of bad faith were a prerequisite to the imposition of sanctions for violations of the Federal Rules of Appellate Procedure, bad faith in this case can be inferred from the making of factual claims contrary to the record.

Fisher also claims that there was no showing of prejudice to Judge Krajewski as appellee. This is incorrect. It is not only

the appellant but also the appellee who has a right to a considered opinion on appeal, an opinion based upon the facts. Indeed, the appellee as the prevailing party has perhaps a greater interest in seeing that a proper decision is reached on appeal since it is a decision in favor of the appellee that is being assailed. Faced with an inadequate record and misrepresentations of facts, the appellee must take actions that the rules require of the appellant, as occurred in this case. It cannot seriously be claimed that Judge Krajewski was not prejudiced by the false claims in the brief submitted by Fisher. If certain of the facts had been true, a reversal might have occurred. To preserve his judgment and to demonstrate just how egregious was the conduct of Fisher and his counsel, Judge Krajewski had to secure the transcript, delaying the appeal. It almost does not need to be mentioned that in these times of soaring numbers of cases on the federal dockets the Seventh Circuit was also prejudiced in its ability to dispense justice speedily by being unnecessarily diverted from the merits to procedural issues. As stated above, this issue is really one between the Seventh Circuit and Fisher and his counsel, and therefore the prejudice to the courts should not be overlooked.

The purpose of sanctions cannot be forgotten. As explained in *Moultron v. Commissioner of Internal Revenue*, 733 F.2d 734 (10th Cir. 1984), courts have:

the inherent power to impose a variety of sanctions in order to regulate our docket, promote judicial efficiency, and deter frivolous filings.

This appeal was frivolous to the extent that failure to secure the record made for three issues (motion in limine, instruction, and verdict forms) when there was absolutely no basis in the record. Such frivolous filings do in fact clog the docket, divert time that is needed to consider meritorious issues, and undermine judicial efficiency. The three issues as to which the record was misrepresented should never have taken the time of the Court.

Penalizing this waste of appellate resources, as much as compensation for damages suffered by prevailing parties, is the justification for sanctions.

Coghlan v. Starkey, 852 F.2d 806, 815 (5th Cir. 1988) (which is surely the lengthiest and most comprehensive discussion of sanctions in the federal courts, citing virtually every case on the point).

Fisher attempts to assail the Seventh Circuit in his petition, alleging that it has issued a disproportionate number of sanctions since 1986 when compared to other circuits. He does not analyze the figures he asserts or cite to the cases that form the basis for his implicit conclusion that the Seventh Circuit is "sanction-happy", so no sufficient response can be made. Maybe the Seventh Circuit, concerned about the quality of representation before it, is reporting more cases than the other circuits. The bare numbers do not indicate anything about the quality of the decisions. In some cases there are sanctions imposed for failure to file a brief, to the detriment of criminal defendants who languish in custody. See, e.g., *United States v. Dominguez*, 810 F.2d 128 (7th Cir. 1987); and *United States v. Stillwell*, 810 F.2d 135 (7th Cir. 1987). In both cases counsel was sanctioned with a fine and the matter was referred to the appropriate state disciplinary authority.

The decision of the Seventh Circuit in imposing sanctions for failure to file the transcript is not, under the facts of this case including the misrepresentations of the record, contrary to or beyond the decisions of other courts, and as to this aspect of the petition it should be denied.

The second aspect of the petition concerns notice and an opportunity to respond to the possibility that sanctions will be imposed.

It is true that there was no order to show cause issued and no specific notice from the Seventh Circuit that sanctions might be imposed against Fisher or against his counsel.

However, both Fisher and his counsel were "on notice". The first issue in the brief submitted by Judge Krajewski was as follows:

This appeal should be dismissed for failure of the Plaintiff-Appellant to follow the Federal Rules of Appellate Procedure.

Brief of Defendant-Appellee Krajewski, page 13. This is the requisite notice.

Other circuits have found that either a motion for sanctions or a request in a brief constitutes notice. *Toepfer v. Department of Transportation*, 792 F.2d 1102 (Fed. Cir. 1986); *Adamsons v. Wharton*, 771 F.2d 41, 43-44 & n.4 (2d Cir. 1985); *In re Universal Minerals, Inc.*, 755 F.2d 309 (3rd Cir. 1985).

As stated earlier, the request for sanctions was made in the brief submitted by Judge Krajewski, although the sanction requested in that brief was dismissal of the appeal. The Seventh Circuit declined to impose that sanction, preferring to affirm on the merits, but did impose sanctions well within its rights and which are comparable to those imposed in other circuits for similar conduct.

Following the filing of Judge Krajewski's brief, Fisher had the opportunity to file a reply brief. He sought and was granted an enlargement of the time within which to file. As that time was about to expire he filed a second request for an enlargement, which was denied as not in compliance with the applicable rules. Thus, Fisher and his counsel were on notice that sanctions were sought and had the opportunity to respond in writing.

Oral argument was held. One of the issues addressed during the argument was the failure to file the record and the possibility of imposing sanctions. Fisher presented at oral argument only lame excuses for the dereliction of duty. They continued to assert that the appeal could be decided without the transcript, but the court needed the transcript to discover

the true facts. They contended, as they did in their brief, that the transcript could not be afforded. That does not vitiate their responsibility since permission to proceed in forma pauperis could have been sought. It further appears to be contrary to the facts, since after the imposition of sanctions Fisher was able to promptly locate the \$1296.00 that the transcript cost, pay that amount to the District Court clerk even before costs were taxed, and attach the receipt as an exhibit to their petition for rehearing.

Fisher clearly had an opportunity to respond to the requests for sanctions and attempted to do so. That he did not succeed does not show that he was denied due process but merely that he did not obtain the desired result.

Fisher and his counsel also appear to be complaining because this matter was referred to the Indiana Supreme Court Disciplinary Commission. That is quite proper. Any member of the bar (and there is no exclusion for judges) who is aware of circumstances indicating that an attorney may not be fit to practice law has a duty to report that information. At least one member of the panel deciding this case — Judge Manion — is a member of the bar in Indiana. Further, this practice is consistent with cases in other circuits. See *McGoldrick Oil Co. v. Campbell, Athey & Zukowski*, 793 F.2d 649, 654 (5th Cir. 1986). There is no split among the circuits on this point.

The petition should be denied for the reason that Fisher and his counsel have failed to present cogent argument that the decision of the Seventh Circuit is inconsistent with decisions of other circuits on the same point or that it is not consistent with controlling authority from this Court. There is no basis upon which to grant the requested writ and the petition should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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